proposals for restrictions on the use of interconnection arrangements—would send erroneous economic signals to the marketplace. Thus, the imposition of restrictions on the uses of interconnection agreements would be contrary to the entire thrust of the '96 Act — the establishment of effective local competition.

## III. NETWORK ELEMENT UNBUNDLING

### A. Limits on Use [¶¶ 85-86]

Just as the Commission should tolerate no limits on the use of interconnection arrangements, it also must make clear that unbundled network elements may be used in any manner chosen by the purchasing party. The ILECs' so called "N minus 1" argument patently conflicts with the plain language of the '96 Act.[70] Specifically, Section 251(c)(3) provides, in pertinent part:

> An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services.[71]

This language is perfectly clear and direct.

Nonetheless, many ILECs contend that any carrier purchasing unbundled network elements must supply at least one component of its facilities directly. Otherwise, according to this argument, the carrier should be allowed to purchase service only from the resale tariff. However, nothing in the Act supports this contention, and the plain language of Section 251(c)(3) directly contradicts it.[72]

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[70] *See, e.g.*, AT&T Comments at 27; CompTel Comments at 38.

[71] 47 U.S.C. § 251(c)(3).

[72] *Id.*

As with other restrictions on use advocated by the ILECs, the obvious intent of their position is to preserve non-cost-based pricing. If all prices were based on costs, the ILECs would be indifferent to whether a competing carrier purchased a full complement of network elements or chose to resell an ILEC service. Interestingly, however, by making the N minus 1 argument, the ILECs implicitly state that the cost-based prices for unbundled network elements are likely to be lower than the discounted retail prices offered for resold services. However, since the ILECs generally also claim that retail services are currently priced at, near or (in some cases) below cost, it is not readily apparent how cost-based charges for unbundled elements could be more attractive to resale carriers than the below cost resale rates.

Whatever the explanation for this apparent inconsistency, the simple fact is that the Commission's mandate under the '96 Act is to initiate a local competitive environment as rapidly as possible. The adoption of artificial restrictions on the use of facilities, expressly designed to preserve the non-cost-based pricing of a monopoly era, would not serve this purpose. Rather, it would result in erroneous signals being sent to the marketplace which could cause potential entrants to make uninformed and uneconomic decisions. Thus, the Commission should reject the ILECs' N minus 1 argument as it clearly runs counter to the language of and policies underlying the '96 Act.

The Department of Justice also anticipated the ILECs' N minus 1 argument and soundly rejected it for similar reasons. In its Comments, the Department stated:

> [T]he ILECs' construction of the statute would frustrate the competitive policies of the Act and create significant practical problems for the Commission. Section 251(c)(3) allows the requesting carrier to 'combine' requested network elements to create

> exchange and exchange access services regardless of whether any of its own facilities are used in providing the service.[73]

The Department adds that if the FCC "were to attempt to read [the N minus 1] requirement into the law it would create an extremely burdensome regulatory responsibility — to determine which interconnectors qualified under a 'minimum local facilities' test for access to the unbundled elements."[74] CWI agrees with the Department's assessment and, again, urges the Commission to reject the ILECs' N minus 1 argument.

### B. List of Network Elements [¶¶ 41, 77, 83, 86-116]

CWI's Comments propose a list of 14 elements that should be unbundled — while AT&T's list consists of 11 and CompTel proffers a list of 16.[75] The ILECs, on the other hand, generally advocate a minimal list of five unbundled elements and believe that the addition of other elements to the unbundled list should be left to the states or to private negotiations. As with refusals to interconnect, the only basis for denial of access to an unbundled network element should be technical infeasibility — any such claims should be demonstrated convincingly by the ILEC. Moreover, the statute makes plain that it is the new entrant and not the monopolist incumbent that determines the elements to which it requires unbundled access. As the Department of Justice stated:

> [T]he statute allows the entrant to effectuate its own judgment as to the most efficient manner of entry, rather than being constrained by an ILEC's determination of the bundle of network elements it is willing to offer. By allowing entrants to make these critical choices, the statute promotes both rapid entry and diversity of service

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[73] DOJ Comments at 45.

[74] *Id.* at 47.

[75] CWI Comments at 19; AT&T Comments at 17; CompTel Comments at 30.

> offerings, two important features of the competitive framework envisioned by Congress for the benefit of consumers.[76]

According to the Department, the statutory goal of the '96 Act "is to require as much unbundling as is technologically feasible . . . "[77] Absent a convincing showing of technical infeasibility by an ILEC, the Commission should adopt a minimum list of unbundled elements like that proposed by CWI, CompTel or AT&T. Moreover, the list should be viewed as a baseline set of requirements. Thereafter, the Commission and the states should be able to add elements to it.

It also should be noted that providing access to unbundled network elements is a prerequisite to an FCC finding that the 14-point checklist of Section 271 has been met.[78] The FCC should adopt an adequate standard to ensure that, when considering Section 271 requests, the BOCs have unbundled their networks to the extent necessary to nurture competition.[79]

### C. Databases [¶¶ 107-09, 112-14]

In its initial Comments, CWI advocates unbundled access to all STP, SCP and AIN databases *without mediation*.[80] AT&T takes the same position.[81] The ILECs, however, argue that AIN interconnection should be deferred to industry committees, to other FCC

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[76] DOJ Comments at 19.

[77] *Id.*

[78] 47 U.S.C. § 271.

[79] *Id.*

[80] CWI Comments at 24-25.

[81] AT&T Comments at 23.

proceedings, or should be denied altogether.[82] They contend, without substantial explanation, that "security" issues require that all other parties be denied access to AIN databases or be given access only through some protective intermediary ("mediated") means.[83]

Before accepting any proposal for mediated access, however, the Commission should require the ILECs to explain fully their technical security concerns and describe the means and timetable they believe are necessary to correct those shortcomings. If the showing is unconvincing, the ILECs should be directed to provide unmediated access immediately. If their showing has merit, then the Commission should order that the problems be remedied as promptly as possible, making clear that no Section 271 application for in-region interLATA authority will be granted until the transition plan is complete.[84]

### D. Pricing of Network Elements [¶¶ 117-19, 123-24, 127, 130, 147-48]

The pricing of unbundled network elements is a critical issue to the realization of the goals of the '96 Act. If the pricing is wrong, none of the other requirements of the Act will be meaningful.

On this issue, the Comments essentially can be divided into two camps: (1) the ILECs, supporting various approaches to fully distributed cost allocation; and (2) nearly everyone else, supporting TSLRIC in some variation. The BOCs universally and adamantly oppose TSLRIC, and several of them, apparently preparing for later court appeals, have advanced constitutional arguments. In making these claims, none of the ILECs acknowledge

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[82] *See, e.g.*, U S West Comments at 58; BellSouth Comments at 47.

[83] *Id.*

[84] 47 U.S.C. § 271.

that many state commissions have utilized TSLRIC pricing for years *at the urging of the ILECs.*[85]

Notably, the Department of Justice endorsed TSLRIC as the appropriate costing methodology, stating that "[p]ricing based on TSLRIC is best suited to ensure efficient and effective entry, efficient production of end services, competitive pricing to end users, and the avoidance of anticompetitive behavior by ILECs to preserve their market power."[86] CWI agrees with the Department that there are several convincing reasons for this conclusion. Among those cited by the Department are: (1) TSLRIC "simulates the prices for network elements that would result if there were a competitive market";[87] (2) TSLRIC will result in the creation of the "'right' investment incentives for competitive facilities-based entry";[88] (3) "TSLRIC pricing for network elements will likely lead to lower prices to consumers";[89] and (4) "TSLRIC pricing will minimize the opportunities for ILECs to engage in anticompetitive behavior . . . ."[90]

The Department of Justice also addressed the issue of joint and common costs raised so adamantly by the ILECs. In this regard, the Department stated that:

> By appropriately choosing a set of network elements that represent discrete physical facilities, TSLRIC prices are more likely to exhaust forward-looking economic costs. By minimizing the remaining joint and common costs, the possibly arbitrary allocation of these costs to

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[85] *See, e.g.*, AT&T Comments at 50.

[86] DOJ Comments at 26.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 27.

[90] *Id.* at 28.

> various network elements is reduced, leading to more efficient pricing of network elements. While the Department does not endorse a particular methodology for allocating joint and common costs, if they are found to exist, we stress that the charges for network elements should not be burdened by any costs other than the TSLRIC and the forward-looking joint and common costs. Doing so would distort the price signals that lead to efficient production, entry, and exit. It would also depart from the important principle of competitive neutrality.[91]

CWI endorses this view and urges the Commission to require that unbundled network elements be priced based on costs as measured in this manner. Unless a true cost-based pricing methodology, such as TSLRIC, is adopted. the unbundling obligations of the Act will be rendered meaningless.

## IV. RESALE

### A. Need for National Rules [¶¶ 177, 196-97]

The preceding discussion already has documented the need for FCC-established national guidelines for interconnection and network unbundling. This need applies equally to the rules and policies which will govern local resale. As CWI pointed out in its initial Comments, resale will be the predominant method of local competition for many years to come. This view also was endorsed by the Department of Justice, AT&T, MCI, ACTA, TRA, ALTS, NCTA and many others.[92] The development of local competition through resale will arrive many years sooner if guided from the outset by FCC-devised uniform national policies. The ILEC notion of 50 different sets of rules, created in 50 separate proceedings, is not consistent with the timetable set by the '96 Act.

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[91] *Id.* at 29.

[92] *See, e.g.,* AT&T Comments at 74-75.

### B. Limits on Services Available [¶¶ 174-77]

As with the need for uniform national rules, the policies supporting unrestricted resale are very similar to those described above in connection with unlimited use of interconnection arrangements and network elements. The Commission should reject the ILECs' suggestions that a variety of retail services should be subject to restrictions. As the Department of Justice stated in its initial Comments:

> Section 251(c)(4) provides but a single exception to the policy of unrestricted resale — it permits a state commission 'consistent with regulations prescribed by the Commission' to prohibit resellers from offering a service to a different category of customers than it is offered to at retail. The Department believes this exception should only be where a residential service can be shown to be priced below cost as a matter of regulatory policy.[93]

CWI endorses this view, which also is reflected in the Comments of CompTel, AT&T and WorldCom, among others.[94] There simply is no justifiable basis for any other limitation.

In contrast to the unlimited resale position taken by the Department of Justice and others, the list of services which the various ILECs propose to shield from resale is extensive.[95] It includes promotional offerings, discounted offerings, coin phone service, grandfathered offerings, sunsetted offerings, services requiring "build-out," services with rates below cost, information services, access services, services sold in large quantities, and other offerings like CPE, white pages, 911, billing and collection and inside wiring.[96] CWI

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[93] DOJ Comments at 49.

[94] *See, e.g.*, AT&T Comments at 75.

[95] *See, e.g.*, Ameritech Comments at 54.

[96] *Id.*

urges the Commission to flatly reject these limitations as they are patently inconsistent with the language and goals of the Act.

With regard to the proposed limitation on the resale of promotional offerings in particular, CWI again agrees with the Department of Justice, which stated that "[i]f promotional plans are permitted that are not available to resellers, the ILECs could clearly use this exception as a means for nullifying or at least diluting the competitive significance of the resale requirement."[97] This principle also holds true for the many other limitations that the ILECs hope to impose on resale. The reason that the ILECs seek to shield discounted services and other offerings from resale are the very same reasons the Commission should mandate permissive resale. Without restrictions on resale, cross-subsidization and anticompetitive conduct will be made much more difficult.

### C. Resale Pricing [¶¶ 175, 179, 180-82]

Section 252(d)(3) of the '96 Act requires that wholesale rates be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[98] The key question left to be resolved by this provision is the determination of the "other costs that will be avoided."

Before reaching the question of costs avoided, however, the ILECs almost uniformly contend that the calculation must be "net" costs avoided. The ILECs argue that they must be allowed to add back into their wholesale prices the administrative costs incurred in accommodating resale. However, the ability to add new costs onto the retail price before

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[97] DOJ Comments at 50.

[98] 47 U.S.C. § 252(d)(3).

subtracting costs avoided cannot be found, nor even implied, in the language of Section 252(d)(3).[99] CWI submits that the plain language of the Act precludes this "net costs avoided" approach advocated by the ILECs. Accordingly, the Commission should reject it.

As for "avoided costs," CWI supports the approach advocated by CompTel, MCI and TRA wherein specific USOA accounts associated with the retail offering of the services are identified and the costs excluded.[100] Moreover, CWI agrees with AT&T that costs need not be "shed" to be "avoided."[101] In addition to the exclusion of the incremental costs avoided, some portion of joint and common costs should be removed from the wholesale rate.

## V. CONCLUSION

The record compiled in this proceeding points unequivocally to a need for uniform national guidance from the Commission if the goals of the '96 Act — rapid and effective introduction of local competition — are to be realized. In establishing these guidelines, the Commission should be mindful of several key principles:

- new local entrants should have maximum flexibility in obtaining unbundled network elements and points of interconnection;
- restrictions on the use of unbundled elements and interconnection should be eliminated;
- the pricing of network elements should be based on TSLRIC; and

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[99] *Id.*

[100] *See, e.g.*, CompTel Comments at 96-97.

[101] AT&T Comments at 84 n.129.

- wholesale prices for resale purposes should be based on subtraction of selected USOA accounts from retail prices with no addition of alleged administrative costs.

Following these principles, and resisting the ILECs' pleas to retain the *status quo*, will best serve the public interest as defined by Congress in the '96 Act.

Respectfully submitted,
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